No. 81-2193

Office - Supreme Court, U.S.
FILED
AUG 10 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

In the Matter of Establishment Inspection of:
HERN IRON WORKS, INC.,

Petitioner,

v.

RAYMOND J. DONOVAN,
Secretary of Labor, U.S. Department of Labor,

Respondent,

and

In the Matter of Establishment Inspection of:
LEWIS YOUNGSTROM, an individual, doing business as
YOUNGSTROM'S LOG HOMES,

Petitioner,

v.

U.S. Department of Labor,
Occupational Safety and Health Administration,

Respondent.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

Of Counsel:
JOHN L. RUNFT, Esq.
TERRY E. COFFIN, Esq.
Runft, Stecher & Coffin, Ctd,
420 W. Bannock Street
Boise, Idaho 83701

ROGER J. MARZULLA, Esq.
MAXWELL A. MILLER, Esq.,
Counsel of Record
MICHAEL R. PERNA, Esq.
Mountain States Legal Foundation
1200 Lincoln Street, Suite 600
Denver, Colorado 80203
(303) 861-0244
Counsel for Petitioners

August 9, 1982

QUESTIONS PRESENTED

1) Does subsection 8(f) of the Occupational Safety and Health Act, which authorizes special inspections pursuant to employee complaints, preclude federal courts from issuing search warrants broader in scope than necessary to determine the existence of violations alleged in the complaint?

2) Does subsection 8(f) of the Act violate fourth amendment probable cause guarantees against unreasonable searches if it is construed to permit the issuance of warrants authorizing inspections which go beyond the scope of employee complaints?

IN THE

Supreme Court Of The United States

In the Matter of Establishment Inspection of:
HERN IRON WORKS, INC.,

Defendant-Petitioner,

v.

RAYMOND J. DONOVAN,
Secretary of Labor, United States Department of Labor,

Plaintiff-Respondent,

and

In the Matter of Establishment Inspection of:
LEWIS YOUNGSTROM, an individual, doing business as
YOUNGSTROM'S LOG HOMES,

Defendant-Petitioner

v.

UNITED STATES DEPARTMENT OF LABOR,
Occupational Safety and Health Administration,

Plaintiff-Respondent.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
INTRODUCTION AND SUMMARY OF REBUTTAL	1
REBUTTAL	2
I. OSHA POLICY CONCERNING THE SCOPE OF COMPLAINT-BASED INSPECTIONS REMAINS SUBSTANTIALLY UNCHANGED DESPITE THE SUBSEQUENT ADMINISTRATIVE PROGRAM DIRECTIVE	2
II. THE TRANSITORY NATURE OF THE SUBSEQUENT ADMINISTRATIVE PROGRAM DIRECTIVE RENDERS IT SUBJECT TO CHANGE WITHOUT NOTICE AT THE AGENCY'S WHIM	6
III. *J.R. SIMPLOT CO. V. OSHA* IS READILY DISTINGUISHABLE BOTH AS TO ITS FACTS AND CONTENTIONS ON PETITION	7
IV. THE CIRCUITS ARE DIVIDED CONCERNING THE PERMISSIBLE BREADTH OF COMPLAINT-BASED WARRANTS. *See Chart Appearing in Appendix as Exhibit A*	8
V. PETITIONER YOUNGSTROM MEETS THIS COURT'S CRITERIA FOR WRIT OF CERTIORARI BEFORE JUDGMENT	9
CONCLUSION	10

APPENDIX

		Page
Exhibit A:	Chart Illustrating Breakdown of Authority on Issues	A-1
Exhibit B:	OSHA Instruction CPL 2.12B, Empl. Safety & Health Guide (CCH) ¶ 12,451 (Feb. 1, 1982) . . .	B-1
Exhibit C:	OSHA Instruction CPL 2.12A [1978-79 Transfer Binder] Empl. Safety & Health Guide (CCH) ¶ 11,743 (Sept. 1, 1979)	C-1
Exhibit D:	OSHA Instruction CPL 2.12 (Dec. 1, 1977)	D-1
Exhibit E:	OSHA Regulation 29 C.F.R. § 1903.11(b) (1981)	E-1

TABLE OF AUTHORITIES

	Page
CASES:	
Carter v. Carter Coal Co., 298 U.S. 238 (1935) . .	9
Cook v. Hudson, 429 U.S. 165 (1976)	6
Ex parte Quirin, 317 U.S. 1 (1942)	9
Graham & Foster v. Goodcell, 282 U.S. 409 (1931)	9
Greene v. McElroy, 360 U.S. 474 (1959)	9
Hannah v. Larche, 363 U.S. 420 (1960)	9
Hern Iron Works, Inc. v. Donovan, 670 F.2d 838 (9th Cir. 1982)	*passim*
J. R. Simplot Co. v. OSHA, 640 F.2d 1134 (9th Cir. 1981) *cert. denied*, No. 81-863 (Feb. 22, 1982)	7, 8
Johnson v. United States Shipping Board Emergency Fleet Corp., 280 U.S. 320 (1930) . . .	9
Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) . .	*passim*
McCulloch v. Marineros de Honduras, 372 U.S. 10 (1963)	9
McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960)	9
New Haven Inclusion Cases, 399 U.S. 392 (1970)	9
Railroad Retirement Board v. Alton R. Co., 295 U.S. 330 (1935)	9
Reid v. Covert, 354 U.S. 1 (1957)	9
Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955)	6
Rickert Rice Mills v. Fontenot, 297 U.S. 110 (1936)	9
Taylor v. McElroy, 360 U.S. 709 (1959)	9, 10
United States v. Bankers Trust Co., 294 U.S. 240 (1935)	9
United States v. Nixon, 418 U.S. 683 (1974)	9
United States v. Thomas, 362 U.S. 58 (1960) . . .	9
United States v. United Mine Workers of America, 330 U.S. 258 (1947)	9
White v. Mechanics Securities Corp., 269 U.S. 283 (1925)	9
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)	9

	Page
STATUTES AND CONSTITUTIONAL PROVISION:	
United States Constitution, Fourth Amendment . .	*passim*
Occupational Safety and Health Act of 1970, 29 U.S.C. § 657(a) (1975)	3
29 U.S.C. § 657(f) (1975)	3
MISCELLANEOUS:	
OSHA Instruction CPL 2.12 (Dec. 1, 1977)	*passim*
OSHA Instruction CPL 2.12A [1978-79 Transfer Binder] Empl. Safety & Health Guide (CCH) ¶ 11,743 (Sept. 1, 1979)	*passim*
OSHA Instruction CPL 2.12B, Empl. Safety & Health Guide (CCH) ¶ 12,451 (Feb. 1, 1982) . . .	*passim*
OSHA Instruction CPL 2.25B, (April 23, 1982) . .	*passim*
OSHA Instruction CPL 2.45, Interim Field Operations Manual (Sept. 15, 1980)	4
OSHA Regulation 29 C.F.R. § 1903.11(b) (1981)	4, 5, 7
Stern and Gressman, *Supreme Court Practice* (5th Ed. 1978)	9
Sup. Ct. R. 18	9

INTRODUCTION AND SUMMARY OF REBUTTAL

Occupational Safety and Health Administration policy concerning the scope of complaint-based inspections remains substantially unchanged despite the subsequent administrative program directive cited by respondents. Any change effected by that directive, if at all, is merely cosmetic. Moreover, since compliance with the Administrative Procedures Act is not a prerequisite to adoption of such directives, the Agency's new policy guideline reflects nothing more than a transitory alteration in agency procedures, which can be revoked at any time without notice at the Secretary's whim.

Respondents also point to this Court's denial of the Petition for Certiorari in *J. R. Simplot Co. v. OSHA*, 640 F.2d 1134 (9th Cir. 1981) *cert. denied*, No. 81-863 (Feb. 22, 1982), and contend that since that case was factually "similar" and raised "identical" questions of law, denial of this Petition is in order. In fact, however, *Simplot* could not be further divorced from these cases, both as to its facts and as to the contentions raised on appeal. While noting the chaos among the circuit courts of appeal concerning the legitimate scope of complaint-based warrants under the fourth amendment as well as under the Occupational Safety and Health Act, the Ninth Circuit in *Simplot* expressly held that it was not deciding the issue. Thus a decision in this regard from that circuit was not forthcoming until its holding in *Hern Iron Works, Inc. v. Donovan.*

Finally, since *Youngstrom v. United States Department of Labor* raises identical legal issues, is factually similar, and comes to this Court before judgment in the same circuit as does its companion case *Hern Iron Works, Inc. v. Donovan*, principles of judicial economy suggest that this Petition should be granted as to *Youngstrom* as well as in the case of *Hern.*

REBUTTAL

I. OSHA POLICY CONCERNING THE SCOPE OF COMPLAINT-BASED INSPECTIONS REMAINS SUBSTANTIALLY UNCHANGED DESPITE THE SUBSEQUENT ADMINISTRATIVE PROGRAM DIRECTIVE

As grounds for their opposition to this Petition, respondents point to OSHA Instruction CPL 2.12B, issued February 1, 1982, stating that the administrative program under which the scope of the inspections in *Hern Iron Works, Inc. v. Donovan* and *Youngstrom v. U.S. Department of Labor* was determined is now defunct.

This contention is highly misleading.

OSHA Instruction CPL 2.12B amends Instruction CPL 2.12A, which was the program directive in effect at the time the warrants in these cases were sought. Instruction CPL 2.12A, issued September 1, 1979, in turn amended Instruction CPL 2.12, in effect since December 1, 1977. Analysis of these sequential program directive amendments clearly reveals that their impetus was one of administrative economy, rather than one of concern for the constitutional rights of employers.[1] New directive 2.12B, for example, expressly acknowledges that its revised procedures simply reflect a reduction in the Agency's field staff.[2] While the prudence and propriety of thus responding to such considerations is not questioned, petitioners contend that the statutory and constitutional problems which existed under OSHA's prior policy concerning the scope of complaint-based warrants, as set out in their original Petition for Writs of Certiorari, persist even under the new directive.

---

[1] OSHA Instructions CPL 2.12B, 2.12A, and 2.12 appear in the Appendix as Exhibits B, C, and D.

[2] OSHA Instruction 2.12B (App., Exh. B). In respectively adopting policy directives 2.12, 2.12A, and 2.12B, OSHA's primary objective was to achieve progressively greater flexibility in targeting inspection activity. OSHA Instruction CPL 2.12B, part F5 (Feb. 1, 1982); OSHA Instruction CPL 2.12A, part F1-2 (Sept. 1, 1979). The efficient utilization of agency resources is in fact offered by OSHA as a justification for full-scope complaint-based inspections. OSHA Instruction CPL 2.12A, part K. Directive 2.12A was not changed in this regard by 2.12B.

Under part J of former directive 2.12A, entitled "Scope of Inspection", inspections conducted pursuant to employee complaints in high-hazard industries generally extended to the entire facility. The new directive, on the other hand, provides that unlimited-scope inspections will not ensue unless the injury records of the particular high-hazard establishment would warrant a full-scope inspection under OSHA Instruction CPL 2.25B. This, however, is the exception, not the rule. Directive 2.12B expressly states that "the inspection of a safety complaint shall *normally* be a comprehensive inspection of the entire workplace". OSHA Instruction CPL 2.12B, part J (emphasis added). Practical application of this directive thus provides little protection against the unconstitutional invasion of an employer's legitimate privacy expectations.

OSHA Instruction CPL 2.25B, modified April 23, 1982, sets out procedures for conducting an "Injury and Illness Records Review" of a particular establishment. OSHA Instruction CPL 2.25B, Appendix D, B3. This procedure involves a mandatory conference between the employer and OSHA compliance officers, as well as a thorough inspection of the employer's employee-injury records. Where this preliminary inspection reveals that a comprehensive inspection would have ensued under directive 2.25B, a second, full-scope inspection of the employer's entire establishment is conducted. Hence, under the new policy directive, an employee complaint coupled with the subsequent mandatory inspection of the employer's injury and illness records, suffice to undermine compliance with this Court's holding in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) that such full-scope inspections be conducted pursuant to an administrative program developed *prior* to the incident of the inspection and based upon *neutral* criteria. *Id.* at 320-21.[3] Rather than reducing the incidence of full-scope inspections,[4] the new directive instead

---

[3] Subsection 657(a) of the Occupational Safety and Health Act applies to inspections conducted pursuant to administrative programs, while subsection 657(f) of the Act concerns complaint-based inspections. See 29 U.S.C. §§ 657(a), (f) (1975).

[4] Respondents purport that the new directive "eliminates a great many full-scope complaint inspections", Respondents' Brief in Opposition at 7-8, despite the directive's express purpose to simply re-target such inspections. OSHA Instruction CPL 2.12B, F5.

makes it easier for OSHA to justify this type of inspection, since it can now apparently disregard the *Barlow's* requirement that the "specific business has been chosen . . . *on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources* . . . ". *Id.* at 321. (emphasis added).

A preliminary inspection of the employer's employee illness and injury records, conducted on the basis of a limited and unsubstantiated employee complaint, is simply not the type of neutral administrative plan which constitutionally justifies a general inspection of the employer's entire premises. Nor does it reduce — either conceptually[5] or actually[6]— the incidence of unlimited-scope searches based upon employee complaints. This is especially true in light of the fact that OSHA Instruction CPL 2.12B must be read in conjunction with OSHA Regulation 29 C.F.R. § 1903.11(b) (1981), which, unlike the new policy directive, has the force and effect of law.[7] This regulation, entitled "Complaints by Employees", provides in pertinent part:

> (b) If upon receipt of such notification [of an alleged violation] the Area Director determines that the complaint meets the requirements set forth in paragraph (a) of this section, and that there are reasonable grounds to believe that the alleged violation exists, he

---

[5] OSHA instruction CPL 2.25B, D2 (April 23, 1982) establishes a minimum requirement of 12 months injury data in order to determine whether a full-scope search is required. In the absence of such data, full-scope inspections will proceed according to practices in effect prior to the adoption of policy directive 2.12B. Policy directive 2.25B, which is incorporated into 2.12B, provides that where the personal injury data is insufficient, a comprehensive inspection will be conducted. OSHA instruction CPL 2.25B, D8. OSHA instruction 2.25B also provides that even where a comprehensive safety inspection is not warranted, a comprehensive health inspection may nevertheless ensue. *Id.*

Finally, OSHA Instruction CPL 2.45, Chpt. VI, Safety and Health Complaint Processing Procedures (Sept. 15, 1980) provides that "the inspection of a complaint in a high hazard industry should generally extend to the entire facility and should not be limited to the complained of working condition". *Id.*, part H1. Although new directive 2.12B revokes provisions of 2.45 which are inconsistent, part H1 of 2.45 is entirely consistent with part J of 2.12B, and both these directives are in harmony with OSHA Regulation 29 C.F.R. § 1903.11(b) (1981).

[6] Respondents cite no evidence that the new directive has in fact resulted in a reduction of full-scope complaint-based inspections.

[7] See text, *infra*, at 6-7.

> shall cause an inspection to be made as soon as practicable, to determine if such alleged violation exists. *Inspections under this section shall not be limited to matters referred to in the complaint.*
>
> 29 C.F.R. §1903.11(b) (1981) (emphasis added).

The statutory and constitutional problems raised in this Petition concerning the legitimate scope of complaint-based inspections thus remain regardless of the new policy directive.

A final point in this regard deserves mention. As respondents have themselves acknowledged, it is impossible to state with certainty whether petitioners' establishments are subject to full-scope inspection under the new program directive. Respondents further observe that "although both petitioners are in high-hazard industries, until petitioners' records are actually examined it cannot be determined whether petitioners have a higher-than-average lost workday injury rate." Respondents Brief in Opposition at 8, n. 10. The ironic ramification of respondents' contention is this: while the new directive purports to discourage full-scope inspections unless the high-hazard target establishment also has an above-average accident rate within the contemplation of CPL 2.25, the only method available to determine the latter — and the method mandated by the new directive — is through an exhaustive search of the target establishment's employee injury records. Even were it conceded that the purpose of CPL 2.12B was to protect an employer from unreasonable full-scope complaint searches, the directive utterly fails in this regard. The new policy directive instead purports to protect one right by infringing upon another. Protecting an employer's constitutional expectations of privacy against unreasonable full-scope complaint inspections by subjecting him to a comprehensive records search is like protecting a tree from a tempest by chopping it down.

In fact, the changes evidence by CPL 2.12B do not materially alter or otherwise cure constitutional violations arising out of OSHA's complaint-based inspection policies. Part F6 of the new directive indeed provides:

> The following significant changes in CPL 2.12A are being made in this instruction:
>
> e. Under CPL 2.12A the scope of inspections of high rate industries was generally the entire facility;

> in the case of low-rate industries, only the working conditions identified in the complaint would have been inspected. *That basic approach will be continued in this instruction;* however, changes are being made consistent with the new targeting instruction, CPL 2.25B.

OSHA Instruction CPL 2.12B, part F6. (emphasis added).

Since "that basic approach will be continued in this instruction," this Petiton must be granted in order that the question of the legitimate scope of complaint-based warrants under both the fourth amendment and the Occupational Safety and Health Act may be finally resolved.

II. THE TRANSITORY NATURE OF THE SUBSEQUENT ADMINISTRATIVE PROGRAM DIRECTIVE RENDERS IT SUBJECT TO CHANGE WITHOUT NOTICE AT THE AGENCY'S WHIM

It is not conceded that OSHA Instruction CPL 2.12B materially amends CPL 2.12A in such a way as to cure the constitutional violations inherent in the Agency's prior policies. Even were it so conceded, however, there is no adequate safeguard to employers since the transitory status of the subsequent directive renders it susceptible to unilateral repeal without notice as per administrative prerogative. Respondents cite *Cook v. Hudson*, 429 U.S. 165 (1976) and *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955), contending that this Court should deny the Petition of *Hern* and *Youngstrom* in view of OSHA's new policy directive. The petitions in *Cook* and *Rice* were denied, however, because in the former case the state legislature had passed a *statute* mooting the issue, while in the latter case a state statute as well as a subsequent *U.S. Supreme Court decision* had resolved the issues. The temporary status of OSHA's new policy directive does not command the weight of a state statute or a decision of this Court, and therefore cannot, under principles established in *Cook* and *Rice*, be said to work a denial of this Petition. In the absence of this Court's ruling concerning the legitimate scope of complaint-based warrants, the Secretary could immediately reinstate its policy of conducting full-scope complaint-based inspections.

Unlike OSHA Regulation 29 C.F.R. § 1903.11(b) (1981), requiring full-scope complaint-based inspections and adopted in conformity with guidelines set out by the Administrative Procedures Act (APA), the administrative program directive here in question does not fall within the ambit of the APA. Thus its status is significantly inferior to that of an OSHA regulation. Just as the new directive was adopted in the absence of procedural safeguards, it can likewise be abolished without complying with the notice and comment requirements of the APA.

III. *J.R. SIMPLOT CO. V. OSHA* IS READILY DISTINGUISHABLE BOTH AS TO ITS FACTS AND CONTENTIONS ON PETITION

In *J.R. Simplot Co. v. OSHA*, 640 F.2d 1134 (9th Cir. 1981) *cert. denied*, No. 81-863 (Feb. 22, 1982), this Court properly declined to review the contention that broad-scope complaint-based warrants were unauthorized under the Occupational Safety and Health Act, or that they were unreasonable within the meaning of the fourth amendment prohibition against unreasonable searches and seizures. Denial was proper because the Nine Circuit in *Simplot*, while noting that "various courts addressing the issue have reached different results" concerning those issues, expressly held that it was not ruling on the matter. As the *Simplot* court unanimously stated:

> *We need not address this broad issue, however, as the facts here require us to do no more than determine the legitimate breadth of the warrant issued by the district court.* In determining the validity of a criminal search warrant, we are limited to the information and circumstances that were available to the issuing officer at the time the warrant was issued. [citations omitted]. Applying this principle here, the proper scope of the inspection warrant is to be determined by considering the information presented to the district court in the warrant application.

J.R. Simplot Co. v. OSHA, 640 F.2d at 1138. (emphasis added).

Until raised by petitioners Hern and Youngstrom, the issues concerning the legitimate scope of complaint-based warrants

were never properly before this Court. The Ninth Circuit in *Hern* below has now held, after surveying the conflicting circuit decisions in this regard, that "[t]he better view is that which permits, absent extraordinary circumstances, general inspections in response to employee complaints." *Hern Iron Works, Inc. v. Donovan,* 670 F.2d 838, 841 (9th Cir. 1982) *quoting Burkhart Randall Division of Textron, Inc. v. Marshall,* 625 F.2d 1313, 1324 (7th Cir. 1980).

Nor is *Simplot* similar on its facts to the cases here on petition. *Simplot* involved the full-scope inspection of two separate corporate divisions, wherein the employee complaint precipitating the warrant gave no indication that the establishment was comprised of more than one building. As initially indicated by *Hern* in this Petition, however, not only were the complained-of violations in *Hern* more specific as to location than those in *Simplot, but the application for the warrant as well as its supporting affidavits all indicated that there was more than one building on the premises.*

These cases are thus diametrically opposed both as to the facts and legal issues decided by the Ninth Circuit.

IV. THE CIRCUITS ARE DIVIDED CONCERNING THE PERMISSIBLE BREADTH OF COMPLAINT-BASED WARRANTS. *See Chart Appearing in Appendix as Exhibit A.*

Respondents acknowledge that the circuit courts of appeal are clearly divided concerning the permissible breadth of complaint-based warrants under both the Occupational Safety and Health Act itself, as well as under the fourth amendment. Respondents' Brief in Opposition at 8-9, n. 11. Respondents further assert, however, that even those courts which recognize the invalidity of general broad-scope warrants in response to employee-complaints would have upheld the warrants in *Hern* and *Youngstrom* under the particular circumstances. Respondents' conclusion in this regard flies in the face of judicial experience to date. As clearly illustrated in petitioners' original Petition for Writs of Certiorari in these cases, as well as in the

Chart appearing herein as Exhibit A, there is absolutely no consistency among the circuit courts of appeal concerning the legitimate scope of complaint-based inspections generally, nor with regard to particular factual settings. Pet. at 8-15. *See* Chart appearing in Appendix as Exhibit A.

V. PETITIONER YOUNGSTROM MEETS THIS COURT'S CRITERIA FOR WRIT OF CERTIORARI BEFORE JUDGMENT

Petitions for writ of certiorari previously granted by this Court "upon a showing that the case[s were] of such imperative public importance as to justify the deviation from normal appellate processes"[8] have traditionally involved issues of great constitutional significance,[9] of otherwise extraordinary national importance,[10] and which raised similar or identical questions of constitutional or other public importance already before the Court in another case.[11] In *Taylor v. McElroy*, 360 U.S. 709 (1959), certiorari was granted before judgment because of the pendancy before the court of another case involving essentially the same important constitutional issues, and since *Taylor* was pending in the *same* court of appeals which had decided the other case.[12]

The Fourth Amendment issues raised by *Youngstrom* are indeed of great constitutional significance since they affect the

---

[8] Sup. Ct. R. 18.

[9] Stern and Gressman, *Supreme Court Practice* (5th Ed. 1978). *See Youngstown Sheet & Tube Co. v Sawyer*, 343 U.S. 579 (1952); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Rickert Rice Mills v Fontenot*, 297 U.S. 110 (1936); *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935); *United States v. Bankers Trust Co.*, 294 U.S. 240 (1935).

[10] Stern and Gressman, *Supreme Court Practice* (5th Ed. 1978). *See United States v. Nixon*, 418 U.S. 683 (1974); *United States v. United Mine Workers of America*, 330 U.S. 258 (1947). *Ex parte Quirin*, 317 U.S. 1 (1942).

[11] Stern and Gressman, *Supreme Court Practice* (5th Ed. 1978). *See New Haven Inclusion Cases*, 399 U.S. 392 (1970); *McCulloch v. Marineros de Honduras*, 372 U.S. 10; *White v. Mechanics Securities Corp.*, 269 U.S. 283 (1925); *Hannah v. Larche*, 363 U.S. 420 (1960); *United States v. Thomas*, 362 U.S. 58 (1960); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *Graham & Foster v. Goodcell*, 282 U.S. 409 (1931); *Johnson v. United States Shipping Board Emergency Fleet Corp.*, 280 U.S. 320 (1930).

[12] The other case was *Greene v. McElroy*, 360 U.S. 474 (1959).

fundamental rights of individuals to be free from unreasonable searches and seizures. *Youngstrom* also raises serious and significant public policy issues, the resolution of which will directly affect thousands of employers across all levels of industry and commerce. Finally, *Youngstrom* raises issues which are identical to those which would already be before this Court in the companion case of *Hern Iron Works, Inc. v Donovan. Hern* is on petition before this Court *after* judgment in the Ninth Circuit Court of Appeals, the *same* circuit in which *Youngstrom* is pending before judgment.

Since *Youngstrom* raises identical legal issues, is factually similar, and comes to this Court before judgment in the same circuit as does its companion case *Hern Iron Works, Inc. v. Donovan*, principles of judicial economy suggest that the Petition should be granted as to *Youngstrom* as well as in the case of *Hern*.

CONCLUSION

For these reasons, Respondents' Argument in Opposition should be dismissed, and the Petition for Writs of Certiorari in both *Hern* and *Youngstrom* should be granted.

Respectfully submitted,

ROGER J. MARZULLA, Esq.
MAXWELL A. MILLER, Esq.,
Counsel of Record
MICHAEL R. PERNA, Esq.
Mountain States Legal Foundation
1200 Lincoln Street, Suite 600
Denver, Colorado 80203
(303) 861-0244

Counsel for Petitioners